Filed 12/28/09 Lurie, Zepeda, Schmalz & Hogan v. Mercantile Investment Advisors CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

LURIE, ZEPEDA, SCHMALZ & HOGAN, Plaintiff and Appellant, v. MERCANTILE INVESTMENT ADVISORS, INC., Defendant and Respondent.	B213204 (Los Angeles County Super. Ct. No. BC382228)

APPEAL from a judgment of the Superior Court of Los Angeles County. Alan S. Rosenfield, Judge. Affirmed.

Lurie, Zepeda, Schmalz & Hogan, Andrew W. Zepeda, Kurt L. Schmalz for Plaintiff and Appellant.

Cooper & Bruning, Brand L. Cooper, Robert M. Bruning for Defendant and Respondent.

A law firm obtained a judgment by default against its former client, who did not answer a lawsuit seeking unpaid legal fees. Four months later, the defendant asked the trial court to vacate the default. The defendant's attorney accepted full responsibility for failing to answer the complaint. The court granted relief and set aside the default. We affirm.

FACTS

Appellant Lurie, Zepeda, Schmalz & Hogan (the Law Firm) filed suit in December 2007 against respondent Mercantile Investment Advisors, Inc. (Mercantile). The Law Firm formerly represented Mercantile pursuant to a written fee agreement, and in the course of that representation, obtained a monetary award in favor of Mercantile. The Law Firm seeks to recover $66,106 in unpaid attorney fees from Mercantile.

On December 27, 2007, the Law Firm's summons and complaint were served upon Randal Whitecotton, an attorney authorized to accept service of process on behalf of Mercantile. In addition, the summons and complaint were twice served by certified mail at Mercantile's office in Nevada. Mercantile signed two green United States Postal Service return receipts on December 21 and December 24, 2007, and these were returned to the Law Firm.

During two telephone conversations in January 2008, Attorney Whitecotton and the Law Firm discussed settlement. Whitecotton then let the matter drop. On February 8, 2008, the Law Firm sent Whitecotton a letter warning that a default would be taken if Mercantile failed to answer the complaint. Whitecotton did not request an extension of time, and did not file an answer. On February 25, 2008, default was entered. On May 13, 2008, the trial court entered judgment by default against Mercantile for $90,765. The Law Firm immediately served notice of judgment on Mercantile and Whitecotton.

In September 2008, Mercantile filed a motion to vacate the default judgment. The centerpiece of Mercantile's motion was a declaration of fault from Attorney Whitecotton. Whitecotton recalled having several settlement discussions with the Law Firm, and making a settlement offer in January 2008. He did not recall whether he received the February 8, 2008 "warning letter" from the Law Firm regarding default. Whitecotton

declared, "I was responsible for responding to the complaint" and "I was negligent in not following up with any mail regarding the complaint." Whitecotton's client was unaware of his neglect of the lawsuit, and Whitecotton noted that "I simply neglected to file an answer on [Mercantile's] behalf." Whitecotton wrote, "I accept full responsibility for the default being entered against [Mercantile]--it is entirely my fault. It is not the fault of my client . . . who had hired me to respond to this legal matter and believed that this matter was being properly handled by me, and they should not be punished for my failure to respond on their behalf." Attached to the motion for relief was a proposed answer to the complaint.

The Law Firm opposed Mercantile's motion for relief. It argued: Mercantile is not qualified to do business in California and therefore cannot pursue its motion; the motion is untimely and Mercantile was not diligent in seeking relief; Whitecotton did not admit fault for the default judgment; and Mercantile was responsible for the default and judgment. The Law Firm objected to the declarations in support of Mercantile's motion.

At a hearing on October 29, 2008, the trial court granted the motion to set aside the default judgment, and allowed Mercantile's answer to be filed. The court ordered Whitecotton to pay the Law Firm $1,500 as compensation. The Law Firm appeals.

DISCUSSION

1. Appealability and Standard of Review

An order granting a motion to vacate a default and default judgment is appealable as an order after judgment. (Code Civ. Proc., § 904.1, subd. (a)(2); *County of Stanislaus v. Johnson* (1996) 43 Cal.App.4th 832, 834.) When a default judgment is vacated, we must uphold the trial court's finding that the default was caused by an attorney's conduct or inaction if the finding is supported by substantial evidence. (*Benedict v. Danner Press* (2001) 87 Cal.App.4th 923, 927-928.) We review the facts in the light most favorable to the prevailing party. (*Milton v. Perceptual Development Corp.* (1997) 53 Cal.App.4th 861, 864, fn. 1.)

2. <u>Absence of a Certificate of Qualification</u>

According to the Law Firm, Mercantile is barred from seeking relief from default because it is a Nevada corporation that failed to obtain a certificate of qualification from the California Secretary of State. A foreign corporation transacting business in California "shall not maintain any action or proceeding upon any intrastate business so transacted in any court of this state," until it secures a certificate of qualification. (Corp. Code, § 2203, subd. (c).) The burden of proving the applicability of Corporations Code section 2203 is upon the party asserting it. (*Automotriz etc. De California v. Resnick* (1957) 47 Cal.2d 792, 794; *Thorner v. Selective Cam Transmission Co.* (1960) 180 Cal.App.2d 89, 90.) The party must prove: "(1) the action arises out of the transaction of intrastate business by a foreign corporation; and (2) the action was commenced by the foreign corporation prior to qualifying to transact intrastate business." (*United Medical Management Ltd. v. Gatto* (1996) 49 Cal.App.4th 1732, 1740.)

It is well settled that Corporations Code section 2203 does not prevent a foreign corporation "from *defending* an action brought against it in the courts of this state." (*American etc. Wireless v. Superior Court* (1908) 153 Cal. 533, 536, italics added); *Winston v. Idaho Hardwood Co.* (1913) 23 Cal.App. 211, 213; *United Medical Management Ltd. v. Gatto, supra,* 49 Cal.App.4th at p. 1739.)

The Law Firm cannot abate Mercantile's motion under Corporations Code section 2203. Mercantile is defending against a lawsuit brought by the Law Firm, and the statute does not bar a foreign corporation from defending itself in state court. The Law Firm characterizes Mercantile's motion as "maintaining" an action or proceeding because it is an attempt "to revive a concluded lawsuit that has been taken to judgment." A defendant's effort to set aside a default does not transform the defendant into a plaintiff: the Law Firm is still the party that is "maintaining" this action.

Further, the Law Firm did not carry its burden of proving that this action "arises out of" California business transactions by Mercantile. A certificate of qualification is required if a foreign corporation enters "into repeated and successive transactions of its business" in California. (Corp. Code, § 191, subd. (a); *United Systems of Arkansas, Inc.*

v. Stamison (1998) 63 Cal.App.4th 1001, 1007.) Although Mercantile once hired the Law Firm to represent it in a legal dispute in California, this does not amount to the repeated transaction of intrastate business. The purpose of the qualification certificate is "to protect against state tax evasion" by foreign corporations doing business in California. (*United Medical Management Ltd. v. Gatto, supra,* 49 Cal.App.4th at p. 1741; *The Capital Gold Group, Inc. v. Nortier* (2009) 176 Cal.App.4th 1119, 1132; *Peacock Hill Assn. v. Peacock Lagoon Constr. Co.* (1972) 8 Cal.3d 369, 371.) No certificate of qualification is needed for a foreign corporation that merely hires a California lawyer. Hiring a lawyer does not fall into the category of a business transaction that protects California from tax evaders, because it is not a taxable event.

3. <u>Substantial Evidence Supports the Trial Court's Order</u>

The law favors trial on the merits; therefore, we liberally construe motions to set aside default judgments in favor of the party seeking relief. (*Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478.) Code of Civil Procedure section 473 (section 473) provides for both discretionary and mandatory relief. If an attorney's admitted neglect causes entry of a default judgment, relief is mandatory: "[T]he court shall, whenever an application for relief is made no more than six months after entry of judgment, is in proper form, and is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect, vacate any (1) resulting default entered by the clerk against his or her client, and which will result in entry of a default judgment, or (2) resulting default judgment or dismissal entered against his or her client, unless the court finds that the default or dismissal was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect." (§ 473, subd. (b).)

As this Court has acknowledged, the purpose of the mandatory relief provision is to relieve the innocent client of the burden of the attorney's fault, to impose the burden on the erring attorney, and to avoid precipitating more litigation in the form of malpractice suits. (*SJP Limited Partnership v. City of Los Angeles* (2006) 136 Cal.App.4th 511, 516; *Metropolitan Service Corp. v. Casa de Palms, Ltd.* (1995) 31 Cal.App.4th 1481, 1487.) "[I]f the prerequisites for the application of the mandatory

provision of section 473, subdivision (b) exist, the trial court does not have discretion to refuse relief." (*Leader v. Health Industries of America, Inc.* (2001) 89 Cal.App.4th 603, 612.) When relief from default is sought, the factual inferences drawn by the trial court are presumed correct. (*Shapiro v. Clark* (2008) 164 Cal.App.4th 1128, 1138-1139.)

The Law Firm argues that Whitecotton's declaration of fault is inadequate because he "does not provide any evidentiary facts, excuses or explanation about why he 'neglected' to file an answer to the Complaint." This argument is unavailing. Relief is mandatory when a complying affidavit is filed, even if the attorney's neglect is *inexcusable*. (*SJP Limited Partnership v. City of Los Angeles*, *supra*, 136 Cal.App.4th at pp. 516-517; *Metropolitan Service Corp. v. Casa de Palms, Ltd.*, *supra*, 31 Cal.App.4th at p.1487.) The Law Firm also contends that while Whitecotton admitted his responsibility for the default, he "does not address nor attempt in any way to explain the entry of default judgment." Plainly, the default judgment was the product of Whitecotton's failure to answer the complaint. Mercantile was unaware that Whitecotton was neglecting the case. Once the trial court accepted Whitecotton's declaration that his neglect of Mercantile's interests caused the default, the court correctly held the attorney accountable for the resulting judgment.

The Law Firm contends that Mercantile is "primarily responsible for the default and default judgment" because Mercantile failed to react to the Law Firm's February 8 "warning letter." Mercantile hired Whitecotton to defend against the Law Firm's action. Mercantile is not responsible if Whitecotton ignored the warning letter. A client is entitled to expect that its attorney will react to legal communications: the client is not required to ensure that the attorney is meeting deadlines, nor is the client required to telephone its adversary to inquire whether counsel is handling the case properly.

"The few cases where appellate courts have affirmed the denial of relief under section 473, subdivision (b), even though the attorney's conduct contributed to the entry of default, have all involved circumstances where the client's *intentional* misconduct was found to be responsible, at least in part, for the dismissal or entry of default." (*Benedict v. Danner Press*, *supra*, 87 Cal.App.4th at p. 929.) The Law Firm made no showing that

Mercantile engaged in intentional misconduct. Accordingly, Mercantile is not responsible for the default.

4. Diligence

The Law Firm argues that Mercantile "was not diligent in seeking Section 473(b) relief." The Law Firm points out that Whitecotton's declaration of fault was signed on July 2, 2008, but Mercantile's motion for relief was not filed until September 18, 2008, which underscores the "leisurely approach to this case" taken by the defendant. Regardless of whether Mercantile took its leisure, the diligence requirement *does not apply* to the mandatory relief portion of section 473. A 1991 legislative amendment to section 473 "eliminated the timeliness/diligence requirement with reference to an attorney affidavit, and require[s] only that the motion be filed within six months after entry of judgment." (*Douglas v. Willis* (1994) 27 Cal.App.4th 287, 291-292; *Metropolitan Service Corp. v. Casa de Palms, Ltd., supra*, 31 Cal.App.4th at p.1487; *Milton v. Perceptual Development Corp., supra*, 53 Cal.App.4th 861, 868; *Prieto v. Loyola Marymount University* (2005) 132 Cal.App.4th 290. 294, fn. 3.) In any event, the evidence shows that during the months between the entry of the default judgment and the motion for relief, the Law Firm and Mercantile's new attorney were attempting to resolve the litigation without going to court. If there was any delay in seeking relief, the Law Firm contributed to the delay.

5. The Trial Court's Fee Award

The Law Firm challenges the trial court's award of $1,500 in attorney fees, payable by Whitecotton, referring to the court's award as "a token amount." At the hearing on Mercantile's motion for relief, the trial court initially denied the Law Firm's request for attorney fees and costs. The Law Firm advised the court that it was required to award fees. When the court awarded $1,500, the Law Firm did not object. By failing to object, the Law Firm denied the trial court an opportunity to increase the award. "[A] reviewing court ordinarily will not consider a challenge to a ruling if an objection could have been but was not made in the trial court." (*In re S.B.* (2004) 32 Cal.4th 1287, 1293.) As this Court once observed, "a trial court should be given at least one opportunity to

correct any error which may have occurred before relief is sought by way of appeal." (*Fox Industrial Realty v. Dio Dix, Inc.* (1982) 136 Cal.App.3d 787, 790-791.)

Even if the Law Firm had preserved the issue for review by making an objection, we would not find an abuse of discretion. "The court shall, whenever relief is granted based on an attorney's affidavit of fault, direct the attorney to pay reasonable compensatory legal fees and costs to opposing counsel or parties." (§ 473, subd. (b).) The Law Firm asked the trial court to award "at least $35,325.67" in attorney fees and costs. This covered work related to settlement discussions ($6,973); work related to the default and default judgment ($12,422); and work related to the Law Firm's opposition to the motion for relief ($15,835).

The settlement discussions did not generate legal fees "necessitated by [Whitecotton's] neglect." (*Matera v. McLeod* (2006) 145 Cal.App.4th 44, 68.) The legal fees claimed for work related to the default and the motion for relief are excessive. The entirety of the Law Firm's request for fees demonstrates that it is overreaching: it was likely this overreaching that provoked the trial court to initially deny the Law Firm *any* amount of attorney fees. Under the circumstances, we find no abuse of discretion.

DISPOSITION

The judgment (order granting relief from default) is affirmed.

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BOREN, P.J.

We concur:

DOI TODD, J.

ASHMANN-GERST, J.